United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original Affidavit of Mailing

74-2055

To be argued by
JOHN L. CADEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2055

UNITED STATES OF AMERICA,

Appellee,

—against—

CARLOS MARTINEZ,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Carlos Martinez appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York (Mishler, *Ch. J.*) on August 2, 1974, after a non-jury trial which judgment convicted him of nine counts of importing cocaine into the United States as well as eight counts of unlawfully possessing, with intent to distribute cocaine, in violation of Title 21, United States Code, §§ 952(a), 960(a)(1) and 841(a)(1).* Appellant

* Named as defendants in the indictment, along with appellant Martinez, were Saul Fontanez, a/k/a "Guillermo Urribe-Gomez", Michael Torre, Ellen Reiner, Evaristo and Elba Quinones, Raffaela Algarin, Gloria Rodas, Iris Maldonado, Mary Faherty, Juan Guillermo Mesa, Jane Doe, a/k/a "Miriam", Elga Gomez, John Doe, a/k/a "Mario", Jaime Palma and Alvaro Hernandez. Defendants Mesa, Jane Doe, a/k/a "Miriam", Elga Gomez, John Doe, a/k/a "Mario", Jaime Palma and Alvaro Hernandez are Columbian nationals who have been and remain fugitives since

[Footnote continued on following page]

Martinez was sentenced to twelve years under the provisions of Title 18, United States Code, § 4208(a)(2) on each of counts two through eleven, fourteen, fifteen and eighteen through twenty-two, plus a special parole term of ten years on each count, to run concurrently, and a fine of $5,000 on each count for a total of $85,000. Chief Judge Mishler ordered that the prison sentence run consecutively to a judgment of conviction entered in the United States District Court for the Southern District of New York, (Lasker, *J.*), on February 1, 1974, which judgment convicted appellant Carlos Martinez of unlawfully possessing with intent to distribute and distributing approximately 248.3 grams of cocaine hydrochloride, in violation of Title

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the instant indictment was filed on January 15, 1974. All other named defendants, with the exception of appellant Martinez, pleaded guilty to count 1 of the instant indictment (conspiracy to import, possess and distribute quantities of cocaine hydrochloride, in violation of 21 U.S.C. §§ 956(a), 960(a)(1) and 841(a)(1)), prior to the commencement of appellant Martinez's trial before Chief Judge Mishler on April 30, 1974. At appellant's trial, defendants Michael Torre and Elba Quinones testified as witnesses for the Government. Following appellant's trial, defendant Michael Torre was sentenced to two years in jail plus a special parole term of ten years and fined $5,000. Defendant Elba Quinones' imposition of sentence was suspended and she was placed on probation for a period of five years. After sentencing, on motion by the United States Attorney, the Court dismissed Counts 2 through 23 of this indictment against defendant Michael Torre and similarly, on the Government's motion, the Court dismissed Counts 8 and 9 against the defendant Elba Quinones.

The other named defendants were sentenced as follows: Gloria Rodas and Iris Maldonado's imposition of sentences were suspended and both were placed on probation for a term of five years. Defendants Mary Faherty, Raffaela Algarin, Ellen Reiner and Evaristo Quinones were sentenced to a year and a day in jail, plus a special parole term of five years. Defendant Saul Fontanez, a/k/a "Guillermo Urribe-Gomez" was sentenced to seven years in jail, plus a special parole term of ten years and was fined $5,000. After sentencing, on motion of the United States Attorney, the Court dismissed the remaining counts of this indictment as against each of these defendants.

21, United States Code, §§ 812, 841(a)(1) and 841(b)(1)(A). Judge Lasker sentenced appellant Carlos Martinez to three years in jail. Appellant is presently incarcerated.

The sole issue on this appeal is whether the disposition of the charges against appellant in the Southern District of New York, before Judge Lasker, operated to bar prosecution on the subsequent indictment in the instant case by reason of either the double jeopardy or due process clauses of the Fifth Amendment.

Statement of Facts

At the trial below, Chief Judge Mishler made detailed findings of fact which are set forth in his opinion and included in the Appellant's Appendix.* On appeal, the Government does not challenge the District Court's findings of facts, however, the following statement has been prepared in the belief that it will help this Court understand the evidence against appellant as that evidence relates to each count in the instant indictment.

A. The Evidence on Eastern District Indictment

Count 1—Formative Days of the Eastern District Conspiracy (late 1971 to November 1972):

In the latter part of 1971, appellant and the defendant Michael Torre met at the Sombrero Restaurant in Queens. Shortly thereafter, appellant went to live in a Manhattan apartment building in which defendant Torre was employed. The two men became friends and at one point Torre was told that appellant came from Bogota, Columbia. In June, 1972, Torre moved into an apartment building

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* Appellant's Appendix is not paginated and references herein to it will be made by describing the document. Judge Mishler's opinion, styled "Memorandum of Decision", is dated July 26, 1974 and is the last document in Appellant's Appendix.

located at 1331 Madison Avenue, Manhattan. In September of that year, Carlos Martinez asked Torre if the latter would allow Martinez to use his Madison Avenue apartment for the purpose of receiving cocaine. Torre agreed and later that same month, appellant and another man named "Hernan" brought cocaine to Torre's apartment secreted in a false bottomed suitcase. Several days later, appellant paid Torre approximately $500 in cash for the use of his apartment (8-24).*

A month later, in October, 1972, appellant contacted Torre again and told him that a man named "Kalle" would bring a pair of shoes, containing cocaine, to Torre's apartment. Several days later, Kalle brought a pair of shoes which he gave Torre at the latter's apartment. Shortly thereafter, appellant came to Torre's apartment and removed the heels of the shoes and left. For his help, Martinez paid Torre $150 in cash (25-29).

Later, in November, 1972, Martinez asked Torre if he could use the latter's apartment to receive two suitcases containing cocaine. Shortly thereafter, appellant, Hernan, defendants Juan Guillermo Mesa and Elga Gomez arrived at Torre's apartment with two suitcases containing cocaine. About a week later, appellant paid Torre $1300 in cash and, at that time appellant told Torre that the cocaine had come from Columbia (30-32).

Counts 2 and 3—The March Transaction:

In March, 1973, appellant introduced Torre to Saul Fontanez, a/k/a Guillermo Urribe-Gomez, who had recently arrived in the United States. Torre came to know Fontanez by the name "Eduardo" (33-34). Later that same month, appellant and Fontanez asked Torre to bring a sum of money to South America as a down payment for a

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* Page references in parenthesis refer to the transcript of trial.

future shipment of cocaine and at the same time asked Torre to "check out" certain routes over which cocaine had been smuggled into the United States. At about this same time, appellant also informed Torre that some Columbians carrying cocaine had been stopped at the United States-Canadian border and that he (appellant) wanted to know if Torre knew Americans who would be willing to go to South America for the purpose of smuggling cocaine into the United States (35-37).

In late March or early April, 1973, Torre was given approximately $36,000 in bank checks by appellant and Fontanez. Appellant told Torre before he left that he (Torre) would be flying from New York to Caracas. When Torre arrived in Caracas, he was to call Juan Mesa in Medellin, Columbia, and arrange to meet Mesa in order to deliver the money. Thereafter, when Torre arrived in Caracas, he flew to San Antonio, Venezuela where he met Juan Mesa and the defendant named in the indictment as Jane Doe, a/k/a "Miriam" in the Hotel Don George. Once at the hotel, Torre turned over the $36,000 in bank checks to Mesa and Miriam. In return, Mesa gave Torre a small suitcase which he told Torre contained approximately one pound of cocaine and which was to be delivered to appellant. When Torre arrived back in New York from Venezuela, he gave the suitcase, with its contents to appellant. Torre received $2500 in cash, plus expenses from appellant for making this trip (38-57).

Counts 4 and 5—The April Transaction:

In early April, 1973, appellant and Fontanez asked Torre if he could provide two couriers to go to South America in order to bring a large shipment of cocaine into the United States. Torre contacted the defendants Evaristo and Elba Quinones (husband and wife), explained the situation to them but they refused to make the trip. When Torre was unable to obtain any couriers, appellant

and Fontanez asked Torre if he would go personally. Torre agreed and on April 6, 1973, he and the co-defendant Ellen Reiner, a woman who lived with him, traveled to Venezuela to pick up suitcases containing cocaine. Before Torre and Reiner left for Venezuela, appellant told Torre to purchase three or four suitcases and bring them with him to Venezuela, where he would exchange them for others containing cocaine in false bottoms. Appellant also gave Michael Torre the money to buy the airplane tickets. About a week after their arrival in Caracas, Torre and Ellen Reiner met Mesa, "Miriam and a man named "Alphonso" at the San Gorge Hotel located in San Antonio, Venezuela. In all, Mesa and Miriam delivered four suitcases containing approximately 4 to 5 kilograms of cocaine which Torre and Reiner brought back to New York and delivered to appellant and Fontanez. For his efforts, Torre received approximately $8,500 in cash from appellant (58-105).

Counts 6 and 7—The First May Transaction:

Between April 21, 1973 and May 1, 1973, appellant and Fontanez spoke to Michael Torre about making another trip to South America. This time, they asked Torre to take approximately $48,000 to $50,000 to Mesa. Torre was told by appellant that this money was to pay for a future shipment of cocaine. On May 1, 1973, as before, Torre traveled to San Antonio, checked into the San Gorge Hotel and met, once again, with Mesa, Miriam and Alphonso where Torre, for the third time, turned over the money to Mesa. In return, Mesa gave Torre a large suitcase which contained one kilogram of cocaine which, upon his arrival in the United States on May 5, 1973, Torre handed over to appellant and Fontanez. Torre received approximately $2500 to $3000 in cash from appellant for making this trip (105-124).

Counts 8 and 9—The Second May Transaction:

Later, around May 10, 1973, Torre was finally able to recruit Evaristo and Elba Quinones to make a trip to South America for the purpose of importing cocaine into the United States. Martinez, Fontanez and Torre agreed that the latter should accompany the Quinones on this trip to insure that all went smoothly. On this particular trip, Torre brought $36,000 in bank checks with him which he gave to Miriam. At about the same time, Elba Quinones went to her room at the hotel where she was given four suitcases contain' approximately four kilograms of cocaine which she and her husband brought back to the United States and gave to appellant. For their efforts, appellant paid them $5,000 in cash (124-143, 413-432).

Counts 10 and 11—The June Transaction:

In June, 1973, Torre discussed with appellant and Fontanez the prospect of employing two couriers to go to South America for the purpose of bringing another shipment of cocaine into the United States. Torre contacted his aunt (defendant Raffaela Algarin) and his girlfriend, Ellen Reiner to make the trip on June 20th. They flew to Venezuela and returned to New York with four suitcases containing approximately four to five kilograms of cocaine. The women gave the cocaine to appellant, Fontanez and Torre. Torre paid the women $5,000 (144-156).*

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* Torre testified that immediately after this trip, around July 5, 1973, he made a trip alone to South America at the request of Martinez and Fontanez. The purpose of this trip was for Torre to bring Juan Mesa approximately $48,000 to $50,000 as well as to inform him that the quality of the cocaine, in recent shipments, was of poor quality. Torre made the trip as planned, did as he was instructed to and returned to the United States with a kilogram of cocaine. At trial, Torre testified that this kilogram of cocaine was his own and that appellant had no interest in it (157-172). As a result of this testimony, Chief Judge Mishler acquitted appellant Martinez of Counts 12 and 13 (See Memorandum of Decision, p. 13; Appellant's Appendix).

Counts 14 and 15—The First August Transaction:

In early August, 1973, Torre spoke again to appellant and Fontanez about sending two couriers to South America to bring cocaine into the United States. Torre contacted two women, defendants Maldonado and Rodas who agreed to make the trip.* When the women returned from South America, they brought back four suitcases containing approximately five kilograms of cocaine which, after their arrival in New York, they gave to Torre, Fontanez and appellant. Subsequently, Torre paid Rodas and Maldonado $5,000 in cash for their efforts (172-189).**

Counts 18 and 19—September Transaction:

Pursuant to another conversation with both appellant and Fontanez in early September, 1973, Michael Torre contacted defendants Raffaela Algarin and Mary Faherty to make a trip to Venezuela to pick up cocaine. These two women went to Venezuela and on September 23, 1973, they arrived back in the United States with six to seven kilograms of cocaine secreted in the false bottoms of six suitcases (223-228).

Counts 20 and 21—October Transaction:

In October, 1973, Torre spoke with Fontanez, who instructed him to obtain couriers for another trip to South

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* Gloria Rodas was the daughter of defendant Raffaela Algarin. Iris Maldonado was a friend of Gloria Rodas.

** Later in the same month, Torre spoke to Juan Mesa and the latter wanted Torre to provide couriers to go to Toronto, Canada to pick up a quantity of cocaine. As a result, Torre contacted Gloria Rodas and Iris Maldonado who agreed to make the trip. Torre testified that he and these women went to Canada and came back to the United States with approximately four to five kilograms of cocaine. However, since Torre testified that he had no knowledge of appellant Martinez's interest or role in this transaction, Judge Mishler found appellant not guilty of both the importation and possession with intent to distribute crimes alleged in Counts 16 and 17 (189-213).

America to pick up cocaine. Prior to this trip and during the course of the conversation, Fontanez told Torre that although appellant was then in Federal detention at West Street, New York,* that part of the October shipment was financed and part belonged to Martinez and that he, Fontanez, would safeguard appellant's share of the cocaine upon its arrival in New York. Torre contacted Gloria Rodas and Iris Maldonado and they agreed to make the trip to South America. On October 8, 1973, the women arrived back in New York with approximately five kilograms of cocaine secreted in the false bottoms of their luggage. After they arrived back in New York, Fontanez accepted appellant's share of the cocaine and told Torre that he would hold appellant's money from this shipment after the cocaine had been sold (228-239).

Counts 22 and 23—November Transaction:

Finally, in November, 1973, Torre was approached for the last time concerning the hire of more couriers to South America for the purpose of bringing more cocaine into the United States. Fontanez told Torre that this shipment was to be a large one and that despite the fact that appellant was still in West Street, he had an interest in this cocaine. Consequently, Torre contacted Mr. & Mrs. Francis Faherty and their nineteen year old son Steven who agreed to make the trip. The Fahertys made the trip to South America and upon their return, at John F. Kennedy Airport, on November 10, 1973, they were arrested in possession of approximately seven and one half kilograms of cocaine which were secreted in the false bottoms of their suitcases. Upon their arrest, the Fahertys agreed to cooperate with federal agents. The agents allowed the Fahertys to pass through customs and return to their home in Brooklyn. On the following day, November 11, 1973, when Michael Torre and Saul Fontanez went to the Faherty

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* Appellant Martinez was detained at West Street pending his trial on the Southern District indictment which figures prominently in this appeal.

home to pick up the cocaine, they were arrested by federal agents (239-248).*

B. The Post Trial Evidentiary Hearing

On May 2, 1974, at the conclusion of appellant's trial on the instant indictment, Chief Judge Mishler ordered an evidentiary hearing be held to determine appellant's contention that, as to the charges embraced in the Eastern District indictment he had already been placed in jeopardy as a result of the Southern District indictment.**

Two witnesses, a government agent and appellant, testified at the hearing to the underlying facts and circumstances which gave rise to the Southern District indictment. Special Agent Michael Levine *** of the Drug Enforcement Administration testified that on July 13, 1973, he and a Government informant named Abdulio Rodriquez met appellant for the purpose of purchasing cocaine. These two men met appellant on a street corner in Manhattan (A. 63). Several minutes later, the three men entered Rodriguez's car, at which time appellant offered to sell Agent Levine a quantity of cocaine (A. 63). The men then drove to Aqueduct Avenue in the Bronx, where appellant exited the car and returned minutes later carrying a yellow box and accompanied by a man named Hector Ordonez. Appel-

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* The District Court appears to have not made a determination of appellants' guilt or innocence on Count 23 which involved his alleged possession with intent to distribute the 15 pounds of cocaine which he had imported on November 10, 1973 (Count 22).

** The minutes of this hearing are included in the Government's Appendix at A. 42 through A. 153. Parenthetical citations to the hearing transcript will be made to the pages as they are numbered in the Government's Appendix as follows: "A. ....."

*** Special Agent Levine's report of investigation dated July 17, 1973, was also admitted into evidence without objection as Government Exhibit #56 and was considered by Chief Judge Mishler in making findings of fact on the double jeopardy issue (A. 154-A. 156).

lant then reentered Rodriguez's automobile and handed Agent Levine the yellow box which contained approximately 250 grams of cocaine (A. 66-A. 67). Three days later, on July 16, 1973, Agent Levine gave appellant $6,600 in cash as payment for the cocaine which he received on July 13 (A. 69).*

On September 18, 1973, federal agents arrested appellant outside a Bronx apartment which he shared with Ordonez. A search of the apartment indicated that lying on the roof of an adjacent building, located just below appellant's window was a shoe box containing 602 grams of cocaine.**

At the hearing, appellant testified that the cocaine he sold to Agent Levine in July, 1973, came from the shipment of cocaine brought into the United States in June, 1973, by Ellen Reiner and Raffaela Algarin A. 109).***

C. The Southern District Proceedings ****

1. The Plea

On December 26, 1973, appellant pleaded guilty to possessing, on July 13, 1973, with intent to distribute and distribution of approximately 248 grams of cocaine

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* This evidence was the basis of Count Two in the Southern District indictment.

** These facts are summarized in a report prepared by Special Agent William Schnakenberg dated September 20, 1973, admitted into evidence without objection, as Government Exhibit #57 (A. 157-A. 159). This evidence was the basis of Count Three in the Southern District indictment. In addition, Assistant United States Attorney Pykett for the Southern District of New York summarized the entire case in a similar fashion before Judge Lasker on December 26, 1973, at the time appellant and Hector Ordonez entered their guilty pleas to Count 2 of the indictment in the Southern District (See Government's Appendix, A. 16-A. 20).

*** This is referred to in the Government's brief as the "June Transaction" covering Counts 10 and 11 in the instant indictment.

**** The indictment in the Southern District, as well as the minutes of appellant's plea and the sentencing have been repro-

[Footnote continued on following page]

before Judge Morris Lasker in the United States District Court for the Southern District of New York. After the Court accepted appellant's plea, the following colloquy took place in appellant's presence:

> Mr. Warburg: Your Honor, may I just add that the only representation that I made to Mr. Martinez is that after he had entered his plea of guilty the government would agree to dismiss the two remaining counts of the indictment.
>
> The Court: I think that that is a reasonable representation, although I don't know whether it's put in terms of the government dismissing those counts at this time or at the time of sentencing.
>
> It is the normal procedure in this Court that when a man is sentenced on a plea of guilty, the other charges against him in the indictment are withdrawn by the government or dismissed with the consent of the government (A. 12-A. 13).

2. The Sentencing

Prior to being sentenced, on February 1, 1974, appellant's counsel discussed the outstanding Eastern District indictment with Judge Lasker. The colloquy was as follows:

> Mr. Warburgh: He asks the court to be as lenient as possible in this case. After he had pleaded guilty and sometime at the beginning of this year, I think January 15, he was indicted in the Eastern District of New York——
>
> The Court: That is not very encouraging.
>
> Mr. Warburgh: ——with a number of other defendants in a conspiracy case involving cocaine. I have the indictment here in court, and there are a

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duced in the Government's Appendix at pages A. 1 through A. 41. Parenthetical citations to the plea and sentencing transcripts will be made to the pages of those transcripts as they are numbered in the Government's Appendix as follows: "A. ....."

number of substantive counts in which he is named that are dated after his date of arrest and confinement in this case.

I ask the court, of course, not to consider that against him because he is presumed innocent in that particular case.

The Court: I shall not (A. 38).

In addition, appellant's counsel also discussed with the Court appellant's prior drug involvement in the context of the presentence report which had been prepared in connection with the Southern District case. That colloquy was as follows:

Mr. Warburgh: Your Honor, the defendant stands before this Court after having pleaded guilty to one count of a three-count indictment involving the possession and distribution of cocaine. I had an opportunity yesterday to read the pre-sentence report, and at this time I want to point out to the Court that there are certain statements in the probation report that I would like to challenge.

* * * The probation report indicates or describes Mr. Martinez as a person who solicited individuals to go to Venezuela to return to this country with cocaine.

The Court: Yes, it does.

Mr. Warburgh: This is based on the information provided by an informant, I believe. Also in the probation report there is some description of Mr. Martinez as a major supplier of cocaine and in a business involving cocaine. Those two facts I would like to challenge at this time, and I believe that the Government should be put to some sort of proof here to substantiate those allegations, because the defendant denies those allegations.

The Court: Proceed.

Mr. Warburgh: If those allegations don't bear, of course—don't have any bearing on the Court's consideration of Mr. Martinez' sentence, then I wouldn't be challenging them. I don't know whether the Court is crediting those statements or not at this time.

The Court: I do not intend to credit them because I find that Mr. Martinez, and I don't think there is any dispute about this, was the moving force in the transaction, is involved in this indictment, and I think that his sentence should be judged accordingly, without reference to the other situations referred to.

Mr. Warburgh: Since the Court then is not going to accredit those descriptions of Mr. Martinez and I assume is not going to use those in considering what sentence to impose upon him, at this time I don't feel then that the Government has to be put to the proof——

The Court: I understand.

Mr. Warburgh: Mr. Martinez as described in the report is 37 years old, and to his benefit has never been involved with the law before. I believe that this involvement in this transaction was an isolated one and because of the excellent work of the federal agents I believe that Mr. Martinez was stopped before he could endanger the public in any other way (A. 33-A. 35).

Thereafter, Judge Lasker sentenced appellant, on Count Two of the indictment, to three years in jail plus a special parole term of three years in accordance with Title 21, United States Code, § 841(b)(1)(a). The Court, with the consent of the Government, dismissed Counts One and Three of the indictment as to both appellant and the co-defendant Ordonez (A. 33, A. 41).

ARGUMENT

Prosecution of the Eastern District indictment was not barred by reason of either the double jeopardy or due process clauses of the Fifth Amendment.

Appellant contends that the instant Eastern District prosecution was barred by virtue of the earlier proceedings in the Southern District. Appellant's main contention is that the "modern theory" of double jeopardy, coupled with the "latest concepts of plea bargaining" require, in effect, a rule of compulsory joinder of offenses; a rule which, in this case, would have required the Government to have joined, in one indictment, the separate offenses charged in the Southern and Eastern District indictments (Appellant's Brief, p. 16). Failing such joinder, appellant urges, the Government was bound to have informed him at the time that he pleaded to the one count in the Southern District that another set of charges were in motion. Armed with that information, he argues, he would then have been in a position to extract a promise against further prosecution and, if need be, enforce it by "specific performance . . . or withdrawal of his plea of guilty" (Appellant's Brief, p. 20).

In treating appellant's contention in the District Court —a contention not quite as elaborate as now advanced— Judge Mishler determined that, because the conspiracy count in the Southern District indictment was during the "term" of the alleged Eastern District conspiracy (Count I) and was also a "part" of the Eastern District conspiracy, the holdings of this Court in *United States* v. *Cioffi*, 487 F.2d 492 (2d Cir. 1973), *cert. denied*, — U.S. —, 94 S. Ct. 2410 (1974) and *United States* v. *Nathan*, 476 F.2d 456 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973) ". . . would bar prosecution" of the Eastern District conspiracy (Memorandum and Decision, pp. 12-13). See also, *United States* v. *Mallah*, — F.2d — (2d Cir. Slip opinions, 5475, 5491-5502; decided September 23, 1974). Accordingly, without determining whether the bar to the Eastern District's

further prosecution of the greater conspiracy rested on a "double jeopardy concept" or upon an "implied . . . promise by the Government not to prosecute for the same offense" (*id.*, at pp. 11-12), Judge Mishler dismissed the conspiracy count in the instant indictment. As to the substantive counts in the Eastern District indictment, Judge Mishler, relying upon *Cioffi*, stated: "A conviction on a conspiracy charge will not give double jeopardy protection on the substantive charges committed during the conspiracy and in the business of the conspiracy" (*id.*, at p. 13). Accordingly, the substantive counts were preserved. The United States believes that Judge Mishler properly retained those charges.

(1)

The double jeopardy clause of the Fifth Amendment provides, not without some ambiguity, that:

> ". . . no person shall be subject for the same offense to be twice put in jeopardy of life or limb . . ."

Though the Court in *United States* v. *Ball*, 163 U.S. 662, 669 (1896), remarked, perhaps with equal ambiguity, that "The prohibition is not against being twice punished, but against being twice put in jeopardy; . . . ," it seems clear that the clause serves two broad and distinct purposes. On the one hand, it is designed to prevent double punishment, *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 168-169, 173 (1873), particularly in those instances where the defendant has already been finally convicted of the same crime. On the other, it is designed to prevent repeated prosecutions where a defendant has already in fact been acquitted of the same charge, *United States* v. *Maybury*, 274 F.2d 899, 904 (2d Cir. 1960), or considered in law to have been implicitly acquitted. *Green* v. *United States*, 355 U.S. 184, 190-191 (1957); see also, *Price* v. *Georgia*, 398 U.S. 323, 328-29 (1970); cf. *Ashe* v. *Swenson*, 397 U.S. 436 (1970). In those two senses, therefore, the double jeopardy provision can properly be considered the direct outgrowth of the English common law pleas of *autrefois convict* and *autrefois*

acquit, United States v. *Sabella,* 272 F.2d 206, 211 (2d Cir. 1959), two pleas which at common law constituted an absolute bar to second or multiple prosecutions.*

No lengthy exposition should be needed to demonstrate that the policies which underscore the prevention of double punishment—in the case of a prior conviction—or repeated and harassing trials of a defendant already acquitted embrace fundamental notions of fairness.

Basically, it is the Government's position on this appeal that none of these rights or policies which the courts have held find expression in the double jeopardy clause has here been violated. Certainly, appellant was not punished twice for the same crime. Nor is this a case where a defendant, following a trial, and having been acquitted, is again made to stand trial for the same offense.

While it is well settled and frequently stated that jeopardy attaches, where issue has been joined, following the swearing of the jury or the taking of evidence in a non-jury case, see *Kepner* v. *United States,* 195 U.S. 100, 128 (1903); *Downum* v. *United States,* 372 U.S. 734, 737 (1963) it is by no means clear when jeopardy attaches, if at all, when a defendant pleads guilty.** Yet, considering

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* In *United States* v. *Cioffi, supra,* at 496, n.4, Judge Friendly remarked: "No small part of the difficulties in double jeopardy law is traceable to the fact that the same tests have been applied to acquittals and convictions, although the policy considerations relative to reprosecution are quite different."

** See Note: The Double Jeopardy Clause: Refining the Constitutional Proscription Against Successive Criminal Prosecutions, 19 U.C.L.A. Law Review, 804, 807, n. 31, where the author states, in part:

> ". . . Because courts draw the jeopardy line at the commencement of trial, jeopardy seems based upon the imminence of conviction. But there is a question as to whether jeopardy would attach at the time of a guilty plea. If no evidence had been presented, then technically it would seem that jeopardy would not attach."

the ". . . unreality in a claim that a convicted defendant who has been in jail has not been in jeopardy," *United States* v. *Sabella, supra,* at 208, it seems entirely correct, for analytical purposes, to state that a defendant's "exposure to a valid judgment of conviction . . ." (*id.*) constitutes the kind of jeopardy contemplated by the double jeopardy clause.* Thus, as to appellant's plea of guilty to the second count in the three count Southern District indictment, the Government concedes that appellant has already been placed in jeopardy as to that criminal transaction.** Moreover, following the implicit thrust of Judge Friendly's comment in *United States* v. *Cioffi,* 487 F.2d 492, 496, n. 2 (2d Cir. 1973), *cert. denied,* — U.S. —, 94 S. Ct. 2410 (1974) *** the Government does not dispute, for the purposes of this appeal, that jeopardy attached to the two remaining counts in the indictment when they were dismissed at appellant's sentencing on February 1, 1974 (see Government's Appendix, A. 41). Thus, we agree that appellant could not subsequently have been prosecuted for the same crimes alleged in counts one and three of the Southern District indictment by reason of the double jeopardy clause.****

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* "Exposure" would not, of course, occur until the entry of the plea. See, *Bassing* v. *Cady,* 208 U.S. 386, 391-392 (1908).

** Count two of the Southern District indictment charged appellant with possession with intent to distribute, on July 13, 1973, 248.3 grams of cocaine in violation of 21 U.S.C. 812, 841 (a)(1) and 841(b)(1)(A) (See Government's Appendix, A. 3). It did not charge importation.

*** Judge Friendly remarked in *Cioffi*: 'The Government does not dispute that the dismissal granted on its motion had the same effect as the acquittal directed by the judge."

**** Count one of the Southern District indictment charged appellant, along with the co-defendant Ordonez, with a conspiracy running from June 1, to September 26, 1973, to possess and distribute narcotic drugs. No mention is made of importation as an object of the conspiracy. Count three of the indictment charged appellant with the possession and intent to distribute cocaine on September 18, 1973 (Government's Appendix, A. 1-2, A. 4). Similarly, the count does not allege importation. Ordonez was not named as a defendant in any of the Eastern District counts.

The short and complete answer to appellant's claim concerning the double jeopardy ramifications of the dismissal of the prior Southern District conspiracy is that there is no double jeopardy. The law is settled; there is no bar to a subsequent prosecution of the substantive crimes committed pursuant to a conspiracy. As this Court recently noted in *United States* v. *Mallah*, — F.2d — (Slip opinions, 5475, 5502; decided September 23, 1974): ". . . separate indictments on substantive counts are always available, without double jeopardy problems." Cf. *United States* v. *Cioffi*, *supra*, at 498, citing *Pereira* v. *United States*, 347 U.S. 1, at 11 (1954); *United States* v. *Crosby*, 314 F.2d 654, 656 (2d Cir. 1963), citing *Pinkerton* v. *United States*, 328 U.S. 640, at 642-643 (1946); *United States* v. *Pappas*, 445 F.2d 1194, 1199 (3d Cir.), *cert. denied*, 404 U.S. 984 (1971).

As to the bar effect of the substantive crimes involved in the Southern District proceedings, it is equally clear that appellant's claim of double jeopardy fails, by a wide margin, to satisfy the "same offense" test. See, *United States* v. *Kramer*, 289 F.2d 909, 913 (2d Cir. 1961); *United States* v. *Pacelli*, 470 F.2d 67, 72 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973). The substantive counts in the Southern District indictment involved appellant's distribution and possession of cocaine, in Manhattan, on two occasions in July and September, 1973. The substantive counts in the Eastern District indictment involved appellant's successive importations of cocaine from South America. Thus, the transactions were entirely separate in fact and the crimes different. There was no double jeopardy. See, *Gore* v. *United States*, 357 U.S. 386, 392-393 (1957); *United States* v. *Nathan*, 476 F.2d 456, 458-459 (2d Cir.), *cert.denied*, 414 U.S. 823 (1973). In no sense, therefore, is the Government invoking the "same offense" test to, as Judge Friendly stated, "the point of rigid formalism." *United States* v. *Cioffi*, *supra*, at 497.

(2)

While this Court, most notably in decisions written by Judge Friendly, has broached the question of compulsory joinder in criminal cases,* it does not appear that any reported decision had gone so far as to require the joinder of related offenses upon pain of dismissal under the double jeopardy or due process clauses. More certainly, the premise underlying Rule 8(a) of the Federal Rules of Criminal Procedure is that of discretionary joinder. That premise has remained uneroded in the Supreme Court. See *United States* v. *Cioffi, supra,* at 497, n. 5.**

Appellant urges, however, that while compulsory joinder may not be required where successive trials are involved, it is nevertheless required in situations where a plea of guilty has been taken. Thus, he urges that, when he pleaded guilty to one count in the Southern District indictment, he should have been informed of the forthcoming Eastern District indictment. In that way, he argues, ". . . he might have been able to negotiate a plea in the Southern District to include the Eastern District charges, or else to obtain a promise from the Government that he would nowhere else be prosecuted for his cocaine dealings" (Appellant's Brief, p. 19).

In part, it seems sufficient to state, in answer to appellant's argument, that none of the cases he has cited sup-

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* See, *United States* v. *Cioffi, supra,* at 497-498, and n. 7 (Friendly, *J.*); *United States* v. *Sabella, supra,* at 211-212 (Friendly, *J.*); *United States* v. *Crosby, supra,* at 657 (2d Cir. 1963) (Friendly, *J.*); *United States* v. *Mallah, supra,* Slip Op. at 5497, n. 7. See also, Note: *The Double Jeopardy Clause: Refining the Constitutional Proscription Against Successive Criminal Prosecutions,* 19 U.C.L.A. Law Review, 804.

** In *United States* v. *Jones,* 334 F.2d 809, 812 (7th Cir. 1964), *cert. denied,* 379 U.S. 993 (1965), the Court expressly rejected the proposition of compulsory joinder.

port, even remotely, the proposition of a law he asserts. Primarily, however, the facts of this case do not warrant the creation of such a proposition even if one were imminent.* Quite simply, appellant was arrested in September of 1973 for having sold cocaine in the Southern District of New York. Notwithstanding that arrest and incarceration, as well as indictment, he continued to operate a substantial drug importation net work. That network was finally broken on November 10 when the Fahertys were arrested and on the following day when Torre and Fontanez were also apprehended. Certainly, until that time, appellant did not state to any Government official that his drug involvement was far wider than they had reason to believe. Indeed, it wasn't until December 12, 1973, when Torre, the main Government witness, began to implicate appellant, that the Government had even an inkling of appellant's greater crimes. Two weeks later, when appellant plead guilty in the Southern District, he remained silent as to his international drug involvement. While one could hardly suppose, of course, that the appellant would have volunteered the information which Torre was only beginning to impart, it seems incongruous, to say the least, that the Government was required to have advised him, in December, of an investigation which, at the time, was only pending. In all events, nothing on that score—one way or the other—was stated at the December 26 pleading in the Southern District, even though appellant, had he wished, could have initiated a wider agreement with the Government. One must suppose, therefore, that appellant was hoping that the Government would never be in a position to prosecute him for his other narcotics crimes.

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* It would seem that, if compulsory joinder is a sound doctrine at all, its initial application should be in the successive trial situation. Such a doctrine would, of course, have to take into account the obligations of the Government with respect to prompt trials and the need t investigate crimes.

On January 8, 1974, Torre testified before the Eastern District grand jury. Thereafter, on January 15, appellant was indicted. On February 1, 1974, he was sentenced in the Southern District case. At that sentencing, appellant's counsel showed his full awareness of the Eastern District case (A. 38). Moreover, he was aware that the probation report also described appellant "a major supplier of cocaine" and as "a person who solicited individuals to go to Venezuela to return to this country with cocaine" (A. 34). With respect to both matters, Judge Lasker expressly stated that he would not consider them in determining appellant's sentence (A. 34, A. 38). Indeed, that stance of the Court was solicited by counsel as part of his argument that appellant's involvement in the Southern District case was an "isolated" (A. 35) event. Hindsight allows us to state that appellant's representation to the Court, which he suffered counsel to make, was completely untrue. In all events, Judge Lasker sentenced appellant strictly upon the basis of his involvement in the case before him:

> "I do not intend to credit them because I find that Mr. Martinez, and I don't think there is any dispute about this, was the moving force in the transaction, involved in this indictment, and I think that his sentence should be judged accordingly, without reference to the other situations referred to" (A. 34-A. 35).

In sum, not once during the Southern District proceeding did appellant suggest that the Eastern District charges were duplicative of those in the Southern District, much less that they should have been joined in one prosecution. In fact, he argued the opposite.* To now urge, as he does, that they were similar, so similar as to require that they be included in the disposition, is so far beyond any concept of "fundamental fairness" as to be ludicrous.

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* Appellant did not seek to withdraw his plea in the Southern District and has made no such attempt to date.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

Dated: October 30, 1974

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
JOHN L. CADEN,
Assistant United States Attorneys,
*Of Counsel.**

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* The United States Attorney's Office wishes to acknowledge the assistant of Jon M. Lewis in the preparation of this brief. Mr. Lewis is a June 1974 graduate of St. John's University Law School.

★ U. S. Government Printing Office 1974— 614—243—44

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

DEBORAH J. AMUNDSEN being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 1st day of November 19 74 he served a copy of the within

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

Paul E. Warburgh, Jr., Esq., Kassner & Detsky, 122 East 42nd St.,

NY, NY 10017

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Pl.E. Borough of Brooklyn, County of Kings, City of New York.

Deborah J. Amundsen
DEBORAH J. AMUNDSEN

Sworn to before me this

1st day of November 19 74

[illegible]
Notary Public, State of New York
No. 24-0[illegible]25
Qualified in Kings County
Certificate filed in New York County
Commission expires March 30, 1976